Supreme Court, U.S.
FILED

No. 941506 MAR 13 1995

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JEROME S. WAGSHAL,

Petitioner, Pro se

v.

Maurice Bramon, et al.

and

BARNETT BANKS, INC., et al.

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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March 13, 1995

QUESTIONS PRESENTED

1. Does a class member who objects to a proposed settlement of a class action lack standing to appeal the district court's order approving the settlement because of failure to intervene pursuant to Rule 24, Fed.R.Civ. P., when the class member responded by objecting in writing to the Rule 23(e) notice inviting the class member, "to participate in the class action on your own behalf," and the class member thereafter **participates fully as a party to the proceeding**?

(The phrase, "**participates fully as a party to the proceeding**," in the preceding sentence includes filing a written objection to the settlement, appearing at the hearing on the settlement, being admitted *pro haec vice* as a member of the Bar of the court, and participating in the hearing by presenting testimony and evidence and presenting argument, and thereafter, pursuant to the court's invitation, submitting proposed

findings of fact and conclusions of law, and submitting various pre-hearng and post-hearing motions, all of which are ruled upon as if he were a party to the proceeding, and is the only objector specially served with a copy of the court's order approving the settlement, and thereafter--following appeal of the approval of the settlement, and remand to the district court during the appeal process--serving interrogatories on both plaintiffs and defendants to which they respond with no challenge to the objecting class member's entitlement to engage in discovery as a party.)

2. Even if Rule 24 intervention is a prerequisite for appellate standing by a member of a plaintiff class objecting to a class action settlement, are (i) a granted motion for admission *pro haec vice*; (ii) receipt by the district court of testimony and documentary evidence submitted by the objecting class member at the hearing on the settlement; (iii) receipt by the district

court of various written motions from the objecting class member both before the hearing and afterwards, and rulings on such motions as if the objecting class member were a party to the proceeding; and (iv) being listed among the recipients of judicial rulings in the case, each individually or all taken together, sufficient indications that the district court has granted the objecting class member leave to intervene as a party, so as to create appellate standing?

PARTIES IN THE PROCEEDINGS BELOW

Plaintiffs: Maurice Bramon, John Paul Decker, John Heller, Harvey Karp, Richard Rosenberg, Theodore Rosenberg, Donald F. Sullivan, Florence W. Sullivan, Howard Weiner.

Interested persons also include all holders of Barnett Bank equity securities, and more particularly, members of the plaintiff settlement class, to wit:

> [A]ll persons or entities, and their successors in interest, who purchased, reinvested in, or otherwise acquired Barnett Equity Securities, namely common and preferred stock issued by Barnett Banks, Inc. ("Barnett") or any security which was converted into an equity of Barnett subsequent to its issuance, between August 15, 1988 and August 15, 1991, inclusive (the "Class Period") other than Defendants...and their officers directors, partners or employees [etc.]

Barnett has stated that it sent out approximately 80,000 notices of the proposed settlement, which is the best indication of the number of stockholders involved.

The Petitioner, Jerome S. Wagshal, is a

Barnett stockholder, and a member of the settlement class.

Defendants: Barnett Banks, Inc., and all subsidiaries and affiliates thereof, the identity of which are unknown to petitioner. Albert D. Ernest, Earl B. Hadlow, Stephen A. Hansel, Allen L. Lastinger, Jr., Charles W. Newman, Charles E. Rice,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Jerome S. Wagshal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The two-sentence opinion of the Court of Appeals, dismissing on the ground of lack of standing (App. A, *infra*), is not reported, by order of the court. The disposition is noted in a table at 38 F.3d 572 (11 Cir. 1994).

GROUNDS FOR JURISDICTION IN THIS COURT

Petitioner's petition to the Court of Appeals for rehearing was denied on December 13, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The issue raised by this petition implicates Rules 1, 8, 23, and 24, Fed.R.Civ.P. The relevant provisions are set out at App. E.

STATEMENT OF THE CASE

This petition raises the issue of standing to appeal an order of settlement of a class action: whether a member of the settlement class who responds to the Rule 23 notice of settlement by objecting in writing, appearing at the hearing on the settlement pursuant to the invitation in the notice to pursue that objection, and participates fully as a party to that hearing with all of the indicia and attributes of a party--including calling witnesses, presenting evidence, presenting argument, submitting proposed findings of fact and conclusions of law by invitation of the court, thereafter making motions and engaging in discovery--and who is treated *de facto* as a party throughout the entire proceeding including being admitted as an a member of the bar of the court pro haec vice--nevertheless lacks standing to appeal the order approving the settlement simply

because he[1] neglected to move to intervene.

As hereinafter described, this ruling raises a fully matured, direct conflict among the circuit courts.

* * *

The plaintiffs (hereinafter "Bramon") brought this securities class action in March 1990 against Barnett Bank and its officers (hereinafter "Barnett") after a Federal audit disclosed major defects in Barnett's reserves. After pretrial proceedings, including denial of a Barnett motion to dismiss, the Bramon attorneys and Barnett agreed on a settlement plan, and disseminated notice of the plan.

Petitioner (hereinafter "JSW"), a class member, received the notice, which stated:

> If you are a Class Member and wish to participate in the class action on your own behalf, you may, if you so desire, enter an appearance through counsel of your own choosing.

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1. References to the masculine in this petition are solely for ease of expression, and are intended to be understood as gender neutral.

Objecting class members were given no further notification or instruction of anything to be done to become a full-fledged party to the proceeding.

Relying on this notice, JSW filed a timely written objection to the settlement plan because it gave nothing of value to the class except limited-term warrants which were clearly destined to be worthless, but $300,000 to the Bramon attorneys.[2]

As it turned out, the warrants were indeed worthless. Barnett stock never rose to a level during the relevant period sufficient to give them any value. They were never traded. Thus the net result of the settlement was that the Bramon lawyers received $300,000.00, and the class members

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[2]. A Barnett officer subsequently admitted that the warrants were "way out of the money," and were never expected to have any value, and that the only persons who were expected to profit from the settlement were the lawyers who sued Barnett. The Barnett officer made this admission to petitioner during the appellate process, after the district court's ruling. Petitioner notified the Court of Appeals of this admission in his brief. Barnett did not deny it.

got nothing, not even reimbursement for their postage in applying for the worthless warrants. In short, this was a classic case of faithless representation by plaintiff's attorneys who negotiated a generous payout for themselves and nothing for the class they were supposed to represent.

Following JSW's original written objection submitted in response to the notice, which was answered by both Bramon and Barnett as if he were a party, JSW appeared at the January 3, 1992, hearing on the proposed settlement, and, being an attorney in good standing in the District of Columbia, was admitted to the Bar of the Court *pro haec vice*--for that case. JSW had thereby done all he had been instructed to do by the notice "to participate in the class action on [his] own behalf," and more.[3]

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3. Petitioner maintains that his admission *pro haec vice*, done pursuant to the notice inviting him, "to participate in the class action," was, under *Farina v.Mission Investment Trust*, 625 F.2d 1068 (5th Cir. 1980), tantamount to the grant of intervention, if intervention was required. *See, infra*, p. 21.

JSW was thereafter treated as a fully participating party at the hearing and in subsequent proceedings, both by the court and by his adversaries, Bramon and Barnett. At the hearing itself, after admission *pro haec vice*, JSW questioned a witness, introduced an exhibit, and presented argument to the court, all of which was noted by the court. See App. C,, p. C-30, Conclusions of Law, para. 11. At the end of the hearing, the Court addressed all participants, including JSW, to schedule submission of proposed findings of fact and conclusions of law.

After the hearing, JSW submitted proposed findings and conclusions of law, and actively participated in an extensive motion practice.[4] (Under Rule 11, Federal Rules of Civil Procedure, only a party may make a motion, the only exception being a motion for leave to intervene under Rule 24, which may

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4. Post-hearing motion practice in which JSW participated included docket nos. 194, 205, 197, 198, 199, 201, 204, 208, 209, 210, 213, 214, 215, 216, 224, 226, 217, 221, 227, 228, and 229.

be made by "anyone.") Neither Bramon nor Barnett ever challenged JSW's standing to make a motion, and the court never suggested that JSW lacked standing. His standing as a party was conceded *sub silentio* by all.

The district court approved the settlement on January 31, 1991. JSW thereafter filed a Rule 52(b) motion, and other motions, all of which was denied, but none because of lack of standing as a party. *See* App. D. JSW's appeal followed.

The court of appeals first questioned the timeliness of JSW's notice of appeal because it related to JSW's Rule 52(b) motion in the district court, and it remanded for a determination of the timeliness of JSW's Rule 52(b) motion in the district court. On remand, JSW served interrogatories on Bramon and Barnett, both responded without objection, and their answers were subsequently filed. Again, under Rule 33(a), Fed.R.Civ.P., only a party may engage in

discovery. On this remand, despite a fierce effort to disqualify JSW on a Rule 52(b) basis, neither Bramon nor Barnett ever challenged his standing as an intervening party, again conceding the point *sub silentio*. On June 9, 1993, the district court determined that JSW's Rule 52(b) motion was timely. Thereafter briefing proceeded.

After all this procedural history during which JSW's standing was inferentially conceded, the Bramon and Barnett briefs raised the standing issue for the first time, relying on the *Guthrie* line of authority (as hereinafter described). Appellant's reply brief argued that: (i) under the *Farina* line of authority (as hereinafter described), he had standing, and, alternatively, (ii) that *Guthrie* was wrongly decided.

On October 13, 1994, the panel issued an unpublished disposition of the case stating: "We conclude that Appellant has no standing. Guthrie v. Evans, 815 F.2d 626 (11th Cir.

1987). Accordingly, this appeal is DISMISSED."

BASIS OF JURISDICTION IN THE DISTRICT COURT

The amended complaint grounded the district court's jurisdiction on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 787aa, and Section 22 of the Securities Act of 1933.

REASONS FOR ALLOWANCE OF THE WRIT

1. A Major Conflict In Circuits Exists

The lower court dismissed this appeal based on a rule denying appellate standing to class members who object to class action settlements but are not formally permitted to intervene. This rule raises a long standing direct conflict involving eight circuits on an issue of national importance which is ripe for resolution by this Court.

The rule that a class member who receives notice of a proposed settlement of a class action and appears to object to the settlement may appeal a district court ruling

approving the settlement without formally intervening, is followed by the Third, Seventh, and Ninth Circuits.[5]

The contrary rule--that a class member appearing pursuant to notice and objecting to a settlement has no standing to appeal approval of the settlement absent formally intervening in the district court--has been adopted by the Fifth, Sixth, Eighth, Tenth, and--as exemplified by this case--the Eleventh Circuit.[6]

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5. Third Circuit: *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1308-10 (3d Cir. 1993); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993). Seventh Circuit: *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Armstrong v. Board of School Directors*, 616 F.2d 305, 327-28 (7th Cir. 1980). *Accord, Paterson v. Stovall*, 528 F.2d 108 109 n. 1 (7th Cir. 1976). Ninth Circuit: *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977). *See also, In the Matter of VMS Ltd. Partnership Sec. Litigation*, 976 F.2d 362, 368 (7th Cir. 1992).

6. *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shults v. Champion Intern.Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992), *cert.denied*, 113 S.Ct. 1251 (1993); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); and *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). Other decisions in several of these circuits, however, do not apply the standing disqualification. *See, e.g., Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981); *In*

This almost evenly balanced conflict among the circuits[7] is direct and palpable, and has been acknowledged by the courts on both sides of the issue. Thus in *Carlough v. Amchem Products, Inc., supra,* 5 F.3d at 713, a case following the rule that objecting class members have appellate standing without formal intervention, the Court noted that holdings which preclude appeals by class members "are directly contrary to our own holding in *Ace Heating & Plumbing Co., Inc., v. Crane Co.,* 453 F.2d 30 (3d Cir. 1971)."

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re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1542 (11th Cir. 1987)(although court stated that class member may preserve appeal from class settlement by objecting to terms of settlement, none of the parties raised issue of standing or the *Guthrie* decision, decided some six months earlier).

7. By petitioner's count, *supra*, the score stands 5 against standing and 3 for, so that a change of one in the majority would create a 4-4 tie.

It noteworthy that the most respected text writers on Federal procedure favor the rule permitting appeal by class members who appear and object at the district court level, without intervening. *See, Moore's Federal Practice,* Sec. 23.1.24[3], and 7C Wright, *Federal Practice & Procedure,* Sec. 1839, at 182 (1986), cited in *Bell Atlantic Corp. v. Bolger, supra,* 2 F.3d at 1307. *See also,* 7B Wright, Federal Practice and Procedure Sec. 1797 at 360-61 (1986), cited in *Silber v. Mabon,* 957 F.2d 697, 700 (9th Cir. 1992.)

Similarly, although *Shults v. Champion Intern. Corp., supra,* 35 F.3d at 1059, went the other way and adopted the requirement of formal intervention as a condition for appellate standing, the court nevertheless acknowledged that "the federal courts of appeals have taken various approaches," in what it referred to as "this unsettled area of the law....." Thus, although each decision in the two lines of authority has individual wrinkles, and strained efforts have been made to attempt to reconcile them based on irrelevant distinctions,[8] the issue of whether a class member needs to move successfully to intervene in the district court in order to appeal an unsuccessful opposition to a class settlement is a true, fully matured circuit conflict ready for authoritative resolution by this Court.

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8. *See, e.g., Gottlieb v. Wiles, supra,* 11 F.3d at 1009-11, text and n. 5 presenting a complex and unpersuasive disagreement with both the Third and Seventh Circuits' analysis of past cases on this standing issue.

Three points stand out from the long list of decisions pro and con on this issue:

First, eight of the thirteen circuits have had occasion to consider this problem, some on multiple occasions. Thus, this issue is neither localized in its focus nor rare in its occurrence.

Second, the issue has been subject to varying rulings in the Federal judicial system since at least 1970, when *Research Corp. v. Asgrow Seed Co., supra,* was decided, and has continued unresolved for a quarter century to the present time. The discussion of all facets of this issue in the many circuit courts which have considered it has established an ample foundation for a definitive determination by this Court.

Third, the position of those circuits which have spoken has hardened, as witness the summary disposition of the present appeal where the court did not even bother to write an opinion despite growing authority on the

other side. Thus the logic of neither side has served to persuade the other after more than a generation. Only this Court's intercession can bring needed uniformity.

2. Issues of Basic Fairness Are Raised By The Position Denying Standing In This Conflict Of Circuits

Petitioner maintains that the cases denying standing were wrongly decided. Although a full-scale discussion of the merits of the issue must await what hopefully will be the grant of certiorari, nevertheless some preliminary observations will underscore the importance of such a grant.

Rule 23, Fed.R.Civ.P. embodies the fundamental principle of procedural due process which mandates that a party affected by a potential judicial determination must be given the best practicable notice of the case and an opportunity to be heard. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The cases denying

objectors standing to appeal improperly limit that constitutional entitlement to the district court level, and that is not enough to provide full justice.

The Federal judicial structure is grounded on the implicit principle that trial courts can err and a higher authority is needed to render the best possible justice to the citizenry, indeed, sometimes two levels of higher authority. The decisions which deny appellate standing to class settlement objectors deny them such full-scale justice, and thus violate the constitutional principles at the heart of Rule 23.

The principles which require giving class members an opportunity to challenge settlements do not evaporate beyond the district court level. Therefore, a class member's objection at a settlement hearing should be deemed to be either an alternative to or tantamount to an intervention for purposes of appellate standing.

3. This Court Should Not Permit The Creation Of Semi-Parties To Litigation

The circuits adopting the requirement of formal intervention as a condition of appellate standing have, as a practical matter, created a novel form of semi-participant in the judicial process, hitherto neither known nor defined in the law, namely a "semi-party" who is entitled to participate in a case *at the trial court level only,* but without a right to appeal an adverse decision.

This Court should prevent the creation of such a half-parties. Such a novel status surely raises potential problems beyond any hypotheticals which could be imagined.

4. Both The Logic And Practical Concerns Of The *Guthrie* Case Should Be Reviewed By This Court

The cases restricting appellate rights to formal interveners stem from *Guthrie v. Evans, supra,* in which the court's overriding concern was administrative efficiency in

handling class actions and its objective was clearly to restrict appeals by class objectors so as to prevent class actions from becoming "unwieldy." 815 F.2d at 629. However, *Bell Atlantic Corp v. Bolger, supra,* considered the same issue and concluded, 2 F.3d at 1310, that the potential disadvantage of possibly making class actions "unwieldy" by permitting objectors to appeal class settlement approvals was outweighed by the advantage to the court of giving appellate standing to objectors when representative plaintiffs join with defendants in promoting a settlement and "judges no longer have the full benefit of the adversarial process."[9]

If such a balancing test is the proper

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[9]. *Bell Atlantic* was a shareholder derivative action under Rule 23.1, Fed.R.Civ.P., rather than a class action under Rule 23. The court in *Bell Atlantic* did not treat this as a meaningful distinction, and petitioner maintains that the court was correct, since there is no meaningful difference between the two rules with respect to the instant standing issue. See *Gottlieb v. Wiles, supra,* 11 F.3d at 1007, for an example of a court which considered the same "balancing" issue, and came to the opposite result, thereby further demonstrating the basic conflict between the two lines of authority in the eight circuits.

road to decision then petitioner is confident that this Court will not find the "unwieldy" chimera imagined by those circuits which follow *Guthrie*. A quarter century of judicial history in those circuits which grant standing to class member-objectors of settlements fails to demonstrate any undue interference with the efficient operation of the judicial process by granting standing.

This case embodies the real-life balance of "unwieldy[ness]" versus fairness which was considered in *Bell Atlantic, supra*. On the one hand, all judges who must deal with this case have an understandable interest in ridding their docket of a case which the district court characterized as "one of the most complex, expensive and potentially longlasting cases that is on the docket in the Middle District of Florida." App. C, p. C-27, Conclusions of Law, para. 9.)

On the other hand, this class action settlement--where plaintiffs' lawyers are

bought off by $300,000.00 and the class they were allegedly representing got absolutely nothing--begs for an outside challenger on appeal.[10] The fact that only a few class members took the time to object to this faithless class representation can be read as resignation that this is the way the system works in real life, rather than any agreement that the result was just. And if this petitioner is simply brushed aside in this case without even being accorded the status of a party entitled to appeal, the message as to how the system works for lawyers and how differently for the public will not be lost.

5. Guthrie Can Be Read As Merely Requiring A Hypertechnical Motion

Although it is somewhat murky on the point, *Guthrie* indicated that an objecting

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[10]. See App C, pp. C - 35-36, where the district court dealt with this point and could find no Federal appellate precedent for an attorney's fee paid in cash where the class members received only "non-monetary" compensation. If the Bramon attorneys had confined their fee award application to an award of the same warrants they obtained for the class, petitioner would not have challenged the settlement.

class member could intervene as of right. 815 F.2d at 628. If so, then the true significance of *Guthrie*, and the cases which follow it, is hypertechnical rather than substantive--simply that objecting class members must remember to take the formal step of moving to intervene in order to preserve their appellate rights. Read in this light, *Guthrie* elevates Rule 24 beyond its reasonable bounds, and represents a major jurisprudential departure by the Eleventh Circuit from a more liberal view it held only two years earlier. In *Piambino v. Bailey*, 757 F.2d 1112, 1121 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), the court brushed aside a challenge to an objecting class member's appellate standing, relying on *Farina v. Mission Investment Trust*, 625 F.2d 1068, 1075 (5th Cir. 1980), where the court treated a motion to remove as motion to intervene, "noting that a contrary position would render federal pleadings excessively

technical contrary to Fed.R.Civ.P. 8(e)(1) and 8(f))." The *Guthrie* holding on class objectors' standing is contrary to this liberal approach. *Guthrie* is also contrary to the principle that, "The Rules of Appellate Procedure 'were not adopted to set traps and pitfalls by way of technicalities for unwary litigants.'"[11]

Based on *Piambino, supra,* petitioner argued in the court of appeals that his motion for admission *pro haec vice* was, by the *Farina* standard, a motion to intervene, a major point which was ignored by the court's curt dismissal, and which should be considered here even if *Guthrie* were to be approved.

Of course, if objecting class members cannot intervene as of right then they would be thrust into a "Catch-22" position of being told that their interests are adequately

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11. *Willis v. Newsome,* 747 F.2d 605, 607 (11th Cir. 1984), quoting in part *Des Isles v. Evans,* 225 F.2d 235, 236 (5th Cir. 1955).

protected by the very consortium of plaintiff's lawyers and defense lawyers whose settlement agreement they are objecting to.

6. The *Marino* Decision Indicates That Review Is Appropriate In This Case

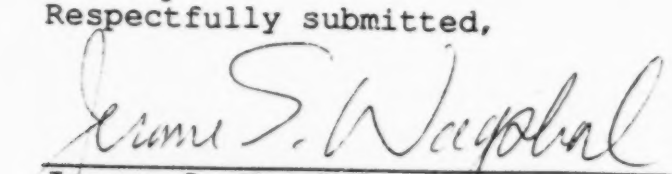
Many of the recent decisions involving objecting class members who attempt to appeal without prior formal intervention cite *Marino v. Ortiz*, 484 U.S. 301 (1988), as an apposite recent decision by this Court. However, the obvious answer is that *Marino* set out the rules only for aggrieved *non*-class members. A definitive ruling regarding the appellate rights of objecting class members is no less important, and would provide a needed balance to the *Marino* decision by establishing the status of objecting class members.

CONCLUSION

This Court should issue its writ of certiorari to review the lower court's decision, because that decision was based on a strongly disputed rule which involves a conflict among eight circuits, and which will affect the

administration of justice adversely in those circuits in which it is followed.

Respectfully submitted,



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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI APPENDIX

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** A member of the Bar of this Court, acting as counsel of record*

March 13, 1995

48 pp

APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR ELEVENTH CIRCUIT

No. 92-2292

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 13 1994
MIGUEL J. CORTEZ
CLERK

MAURICE BRAMON, JOHN HELLER, RICHARD ROSENBERG, THEODORE ROSENBERG, HARVEY KARP, TRUSTEES OF CIRCLE PACKAGING CORP. PENSION PLAN, DONALD F. SULLIVAN, FLORENCE W. SULLIVAN, JT, HOWARD WEINER, JOHN PAUL DECKER,

Plaintiffs-Appellees,

JEROME S. WAGSHAL, Objecting Class Member,

Appellant,

versus

BARNETT BANKS, INC., CHARLES E. RICE, ALBERT D. ERNEST, STEPHEN A. HANSEL, ALLEN L. LASTINGER, JR., CHARLES W. NEWMAN AND EARL B. HADLOW,

Defendants-Appellees

HELEN B. RUDMAN,

Claimant.

Appeal from the United States District Court
for the Middle District of Florida

(October 13, 1994)

Before: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

We conclude that Appellant has no standing. Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987). Accordingly, this appeal is

DISMISSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR ELEVENTH CIRCUIT

No. 92-2292

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MAURICE BRAMON, JOHN HELLER,
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CORP. PENSION PLAN,
DONALD F. SULLIVAN, FLORENCE W. SULLIVAN, JT,
HOWARD WEINER, JOHN PAUL DECKER,

Plaintiffs-Appellees,

JEROME S. WAGSHAL,
Objecting Class Member,

Appellant,

versus

BARNETT BANKS, INC.,
CHARLES E. RICE, ALBERT D. ERNEST,
STEPHEN A. HANSEL, ALLEN L. LASTINGER, JR.,
CHARLES W. NEWMAN AND EARL B. HADLOW,

Defendants-Appellees

HELEN B. RUDMAN,

Claimant.

On Appeal from the United States District
Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTIONS(S) OF REHEARING EN BANC

Before: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM;

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 34, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. L. Anderson

UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

MAURICE BRAMON, et al.,

Plaintiffs,

v. Case No. 90-216-CIV-J-16

BARNETT BANKS, INC., et al.,

Defendants.

ORDER APPROVING CLASS SETTLEMENT AND PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES

This cause is before the Court on the Plaintiffs' motion to approve the stipulation of settlement (the "Settlement") entered into between the parties concerning this class action, and the Plaintiffs' petition for attorneys' fees and expenses. The Court having reviewed the memoranda of the parties, as well as the letters and memoranda of the

five[1] objectors, and having held a three-hour hearing on January 3, 1992, at which time the Court accepted testimony and evidence presented by the parties, as well as one of the objectors, Mr. Jerome Wagshal, the Court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. This litigation was commenced by the filing of several different actions in March 1990. In July 1990, Plaintiffs filed an Amended Class and Derivative Complaint (the "Amended Complaint") against Barnett Banks, Inc. ("Barnett") and certain of its senior officers and directors: Charles E. Rice, Albert D. Ernest, Jr., Stephen A. Hansel, Allen L. Lastinger, Jr., Charles W. Newman, and Earl B. Hadlow. The Amended Complaint

[1] At the time of the hearing, only four objections had been received by the Court. A fifth objector, Mr. James Reim, filed his objection on January 7, 1992. Although this objection was late pursuant to the published notice, and was not part of the discussion at the January 3, 1992, this Court has duly considered this objection as well as the four previously filed.

was filed on behalf of a class consisting of all persons who purchased Barnett securities during the period March 1989 to March 1990. For purposes of the Settlement, the period has been extended to August 15, 1988 through August 15, 1991. Plaintiffs alleged, among other things, the Defendants knowingly or recklessly made materially false and misleading statements with respect to Barnett's financial condition, specifically loan loss reserves.

2. In July 1990, Plaintiffs also filed their motion for class certification. Shortly thereafter, Defendants moved to stay class certification proceedings until 45 days after the Court ruled on the motion to dismiss that the Defendants planned to file. A few days later, Plaintiffs filed their response to this motion, arguing, in part, that any such stay would unduly delay these proceedings. By order dated August 23, 1990, the Court granted Defendants' motion to stay

class certification. On October 3, 1990, the Court denied Plaintiffs' objections to Judge Schlesinger's August 23, 1990 order granting Defendants' motion to stay class certification proceedings.

3. Meanwhile, at the end of July 1990, Plaintiffs served their first consolidated set of written discovery requests on all Defendants. Although these discovery requests were broad, Plaintiffs' counsel were willing to negotiate a phased document production. Under this proposal, Defendants would first produce readily obtainable, particularly important documents, leaving other documents for production at a later time.

4. At the end of August 1990, Defendants moved to stay merit discovery, asking the Court to extend the time in which they could respond to Plaintiffs' discovery requests until after the Court's ruling on Defendants' motion to dismiss, which was

filed shortly thereafter. On October 2, 1990, the Court heard extensive oral argument on Defendants' motion to stay discovery. at the conclusion of argument, the Court urged the parties to negotiate further in attempt to solve, or at least narrow their differences regarding the pace and sequence of discovery. At the end of the hearing, counsel for both sides sat down together for a protracted period, each side negotiating in good faith. Though the differences were narrowed by this process, they were not eliminated. Accordingly, both Plaintiffs and Defendants made further written submissions to the Court, including forms of order. Finally on October 18, 1990, the Court entered an order which generally denied the relief requested by Defendants' motion to stay discovery.

5. In August 1990, Defendants filed a motion to dismiss the class and derivative allegations of the Amended Complaint. During

October 1990, Plaintiffs filed separate memoranda of law in opposition to the Defendants' motion. On November 29, 1990, the Court, without opinion, denied the motion to dismiss.

6. In November and December 2990, the parties intensified their discovery. Plaintiffs served discovery requests on Price Waterhouse, Barnett's auditor. Defendants served notices of deposition and written discovery requests on various Plaintiffs. Plaintiffs served responses to Defendants' written discovery just prior to Christmas 1990. Also during this time, Plaintiffs moved to compel.

7. In January 1991, after denial of their motion to dismiss, Defendants answered the Amended Complaint and asserted affirmative defenses. as 1991 progressed, both parties vigorously pursued discovery. Plaintiffs obtained discovery not only from Defendants, but also from Barnett's auditor.

8. At the end of January 1991, Defendants moved to compel production from Defendants.[sic] In this motion, Defendants sought a number of documents directed to class certification and on the merits. Subsequently, Plaintiffs moved for a protective order.

9. On March 8, 1991, following extensive briefing on all these discovery motions, the Court entered an order which granted Plaintiffs' motion to compel in part, granted Defendants' motion to compel in part, and determined that Plaintiffs' motion for a protective order was moot.

10. The Court's discovery order of March 8, 1991, spawned additional filings, including Defendants' motion for clarification and Plaintiffs' objections regarding different portions of the order. Defendants' motion for clarification was granted by order dated May 8, 1991, and Plaintiffs' moved for reconsideration of that

order. On April 26, 1991, the Court denied Plaintiffs' objections to the Court's March 8, 1991 order. Thereafter, Plaintiffs unsuccessfully sought a writ of mandamus from the United States Court of Appeals for the Eleventh Circuit.

11. In April 1991, Defendants filed a motion for partial summary judgment in their favor for certain of the counts in the Amended Complaint. Plaintiffs then agreed to the dismissal of the claims under the Securities Act of 1933 (Counts II, III and IV), but continued to pursue their claims asserted under Section 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 10B-5 (Count I). Later, Plaintiffs also agreed to the dismissal of the derivative portions of the Amended Complaint (Count V). ON April 23, 1991, and June 12, 1991, the Court approved the dismissal of the counts.

12. On July 22, 1991, Defendants filed an extensive motion for judgment on the

pleadings on Count I, the Section 10(b) and Rule 10b-5 claim, and appended orders from seventeen recent cases decided in other United States District Courts which had dismissed similar federal securities class action suits brought against financial institutions and their officers.

13. Following this intensive discovery and motion practice, the parties to this litigation began settlement negotiations in mid-1991. Prior to mid-1991, the possibility of settlement of the litigation had been considered, but serious negotiations had not taken place. By mid-1991, on the basis of their considerable investigation and discovery, Plaintiffs' counsel has [sic] represented that they had a clear view of the strengths and weaknesses of their case. In particular, Plaintiffs' counsel reviewed minutes of the Board of Directors of Barnett and its audit committee, as well as the work papers of Barnett's auditor, Price

Waterhouse, all directly relating to loan loss reserves. These documents demonstrated to Plaintiffs' counsel that Barnett's loan reserve methodology appeared to be conservative and prudent.

14. Early in the negotiations, Plaintiffs' counsel realized that, if there was to be a settlement, warrants for the purchase of Barnett stock would necessarily comprise most of the consideration paid for the benefit of the class. Thereafter, at the end of July 1991, following weeks of negotiations between Plaintiffs and Defendants, the parties reached a claims-made settlement with a total value of $1,6000,000.00, including warrants having a value of $1,300,000.00.

15. At this point, the negotiations were not entirely complete. The items in dispute now centered on the exact terms of the warrants. Defendants initially insisted that the exercise price (the price at which

Barnett shares could be purchased through exercise of the warrants) must be $48 per warrant Plaintiffs argued for a lower exercise price. Defendants also took the position that the warrants, if they became exercisable April 1, 1992, must expire on July 31, 1992. Plaintiffs argued that the expiration date must be later.

16. Defendants backed up their position with a valuation by a nationally recognized investment banker. In September 1991, as the negotiations continued, Defendants sent to Plaintiffs an evaluation by the Wall Street firm Dillon, Read & Company ("Dillon Read"). According to Dillon Read, 1,300,000 warrants would have a value of $1,300,000.00, assuming an exercise price of $48 per share and an exercise period of April 1, 1992 through July 31, 1992.

17. Despite the undeniable expertise and reputation of Dillon Read, Plaintiffs were not satisfied. Plaintiffs consulted

their own investment banker, Howard, Lawson & Company ("Howard Lawson"). Drawing on Howard Lawson's expertise, as well as their own experience in fashioning settlements in securities class actions, Plaintiffs' counsel wanted better terms. Plaintiffs insisted on a lower exercise price and longer exercise period.

18. Defendants obtained another valuation from Dillon Read dated October 22, 1991, with an exercise price of $45.50 per share and an exercise period of April 1, 1992 to July 31, 1992. Plaintiffs rejected this lower exercise price and insisted on adding a fixed formula tying the exercise price to the market price of Barnett common stock, thus protecting class members against an unexpected fall in the price of Barnett stock pending final approval of the settlement and delivery of the warrants. Finally, Plaintiffs insisted that the warrants, exercisable beginning on April 1, 1992, must

expire August 31, 1992, and not July 31, 1992. Counsel for both Plaintiffs and Defendants reconsidered their positions and consulted with their experts and clients.

19. Defendants agreed to the lower exercise price, the addition of a fixed formula, and an extension of the expiration date of the exercise period. The exercise price dropped from Defendants' initial position of $48 per share to $45.50 per share. In addition, the exercise price could not exceed 140% of the closing price of Barnett's common stock on the day before the beginning of the exercise period. Finally, the exercise period would end August 31, 1992.

20. After these improvements in the terms of the warrants, Howard Lawson was able.to confirm to Plaintiffs' counsel that the warrants had a fair market value as of October 22, 1991 of $1.00 each. Indeed, there is sound reason to believe that the

fair market value of each warrant as of issuance will be considerably in excess of $1.00. This is because, as noted above, Dillon Read had already valued the warrants at $1,300,000 total, before the warrants' terms were sweetened by the addition of tying the exercise price to any downward movements in Barnett's stock through imposition of the 140% formula, and the extension of the exercise period through August 31,1992. The Defendants also agreed to pay the expense of administering the Settlement, including newspaper ads, printing and postage.

21. On October 28, 1991, after extensive , protracted and arms-length negotiations the Stipulation of Settlement was signed by the parties' counsel and filed with the Court.

22. The Settlement negotiated by the parties provides that the Defendants shall pay on a claims made basis 1,250,000 warrants, valued as of October 22,1991.

(class members have until February 10,1992 to mail their proof of claim.) Also, pursuant to the Settlement, Defendants have put into escrow $300,000.00 in cash (to be held in an interest bearing account) and 50,000.00 warrants, which are available for Plaintiffs' fees and expenses if awarded by the Court. The Settlement also provides for the certification, for Settlement purposes only, of a class of Barnett equities. The class is defined as all persons or entities who purchased, reinvested in,or otherwise acquired interest in any equity securities, including common stock and preferred stock, issued by Barnett or any security which was converted into an equity security of Barnett subsequent to its issuance during the settlement class period (August 15,1988 to August 155,1991, inclusive), each in his, her,or its individual capacity, and any and all collective representatives, trustees, assigns, heirs, executors, administrators,

custodians, predecessors or successors in interest, or any other person having any legal or beneficial interest other than Defendants in this litigation as defined in the Settlement, and their officers, directors, partners,or employees members of their immediate families.

23. On November 14, 1991, the Court ordered that this action shall proceed as a class action, for settlement purposes only, under Rule 23 of the Federal Rules of Civil Procedure. In addition, the Court approved the form of the Notice of Pendency of Class Action, Proposed Settlement and Hearing Thereof and Right to Share in Settlement Proceeds (the "Notice") and the publication of a summary notice. The Court also set a hearing for January 3, 1992 to determine whether the proposed settlement should be approved and to consider Plaintiffs' application for attorneys' fees.

24. Plaintiffs seek $300,000.00 in

cash and 50,000 warrants for payment of fees and expenses. The expenses submitted are $55,226.71. The balance of the fees and expense award will be applied to fees. Plaintiffs' counsel, in the aggregate, have expended 3,069 hours, for a total lodestar of $744,943.25.

25. The notice was published in the national editions of the Wall Street Journal and U.S.A.Today on November 18,1991. In addition, more than 37,000 copies of the Notice were sent to shareholders who held Barnett stock in their own name, while more than 38,000 Notices have been sent to shareholders who hold Barnett stock through the name of a representative, commonly known as a street name.

26. A total of four objecting class members, objecting to the approval of the Settlement, were received by the Court as of January 3,1992, the date of the hearing. One more objection was received, and filed with

the Court on January 7, 1992. This Court is cognizant of a total of five objections as of the date of this Order.

27. On January 3,1992, this Court held a three hour hearing and heard arguments from counsel for the parties, as well as from the only objecting class member present, Mr. Wagshal. The Court afforded the parties and Mr. Wagshal an opportunity to present their views, testimony and evidence that they deemed relevant.

Conclusions of Law

1. Rule 23(e) requires notice of a proposed dismissal or compromise "in such manner as the Court directs." The purpose of the notice is to provide absent class members with certain basic information so that they have an opportunity to consider the terms of the settlement. Heit v. Amrep Corp., 82 F.R.D. 130 (S.D.N.Y. 1979). On November 14 1991, this Court approved the notice sent out to class members, as stated earlier in this

Order. Again, on review the Court finds that the notice in this case was sufficient to meet the requirements of both Rule 23(e) and due process. The settlement terms give sufficient, basic information to a shareholder to allow him/her to make a rational decision on whether to participate in the settlement.

2. A proposed class action settlement and any award of attorney's fees and costs in a class action requires court approval. See Piambino v. Bailey, 757 F.2d 1112, 1139-42 (11th Cir. 1985), cert. denied 476 U.S. 1169 (1986). Under Rule 23(e), Fed.R.Civ.P., the Court should not attempt to try the case on the merits. See Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); Behrens v. Wometco Enterprises, Inc., 118 F.R.D. 534, 539 (S.D. Fla. 1988), aff'd 899 F.2d 21 (11th Cir. 1990). A trial court's approval of a settlement will not be upset on appeal unless the court clearly abuses its discretion. See

In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 207 (5th Cir. 1981).

3. If the trial court finds that the proposed settlement is fair, adequate and reasonable, the settlement should be approved. Id. There is a strong judicial policy favoring settlement. The Court recognizes that "compromise is the essence of settlement." Bennett v. Behring Corp., 737 F.2d 982, 896 (11th Cir. 1984).

4. Several factors may be considered in determining whether a proposed settlement is fair, adequate and reasonable. This Court will consider the following factors, the first six of which have been specifically enumerated by the United States Court of Appeals for the Eleventh Circuit:

(i) the likelihood of success at trial;

(ii) the range of possible recovery;

(iii) The point on or below the range of possible recovery at which a settlement is

fair, adequate and reasonable;

(iv) the complexity, expense and duration of litigation;

(v) the substance and amount of opposition to the settlement;

(vi) the stage of proceedings at which the settlement was achieved;

(vii) the recommendation and experience of counsel; and

(viii) the ability of the defendants to withstand greater liability.

Id.; Behrens v. Wometco Enterprises, Inc., 118 F.R.D. at 538-39; see also, In re Corrugated Container Antitrust Litigation, 643 F.2d at 217; Mashburn v. National Health Care, Inc., 684 F.Supp. 660, 667-68 (M.D. Ala. 1988). See generally H. Newburg, Newburg on Class Actions, Secs. 11.40-11.49 (2d Ed. 1985)(and cases cited therein).

5. Before any of these factors may be considered, however, the Court must make an initial finding that the settlement is the

product of arms-length negotiations, and not arrived at by fraud or collusion. This Court handled the discovery disputes between the parties in this litigation. Those disputes were vigorously contested by both sides. In addition, at the January 3, 1992 hearing, counsel for both parties represented that there was no fraud or collusion involved in the Settlement and that negotiations leading to settlement had been at arms-length. While the objector, Mr. Wagshal, raised the possibility of fraud or collusion, he was unable to present any evidence to support this possibility when given an opportunity to do so by the Court. Thus, Mr. Wagshal's assertion that this Settlement was a product of fraud and/or collusion is nothing more than unsupported speculation. Additionally, the papers filed with respect to the Settlement demonstrate nothing but hard-fought negotiations between the parties, particularly with respect to the terms of the

warrants. In sum, the Court finds that there was no fraud or collusion in reaching this settlement.

6. The first factor is the likelihood of success at trial by the plaintiffs. The Court has taken notice of the caselaw [sic] from other district courts throughout the nation dismissing similar actions against financial institutions. Defendants provided this Court with a complete set of the seventeen opinions extant at the time they filed their motion for judgment on the pleadings in July 1991. More important, the court gives strong weight to the Plaintiffs' counsel's candid recognition set forth in their motion for approval of the settlement, as well as statements made at the hearing on January 3, 1992, that the discovery in the case revealed a greatly-reduced likelihood of success on the merits of Plaintiffs' claims. Plaintiffs' counsel specifically referenced a number of categories of documents produced by

Barnett, with a special emphasis on Price Waterhouse's workpapers, as indicating the absence of a strong probability of success on behalf of the Plaintiffs. Accordingly, this Court finds that there is a small likelihood that the Plaintiffs would succeed at trial, even assuming they were able to survive the Defendants' motion for judgment on the pleadings and a future motion for summary judgment.

7. With respect to the second factor, the range of possible recovery, this Court finds that in June 1991, the Plaintiffs' own experts preliminary estimated damages to be in the range of $9,200,000.00 to $14,800,000.00. However, Plaintiffs' counsel pointed out both in their papers and at the hearing on January 3, 1992 that since the end of 1990, the price of Barnett stock has risen to a level that would suggest that the Defendants could make a very credible argument to a jury that the Plaintiffs' class

had suffered little, if any , damages. Plaintiffs' counsel also pointed out that for the period immediately following the announcement of Barnett's higher loan loss reserves, the price of Barnett stock only dropped fractionally. On an out-of-pocket damage standard, which is applied in Rule 10b(5) cases, see Behrens, 118 F.R.D. at 541, the Court finds that the possible range of recovery is limited by the Plaintiffs' experts' preliminary analysis. At very most, the Plaintiffs' could have hoped for a recovery in the very low eight figures range had they obtained a verdict at trial and been successful opposing post-trial motions, as well as on appeal. The Court also notes that even though the Settlement is considerably less than the best that could possibly be achieved at trial, this does not make settlement unreasonable. Id. at 542. "A settlement can be satisfying even if it amounts to a hundredth or even a thousandth

of a single percent of the potential recovery." Id.

8. Next, the Court turns to the third factor of the point on or below the range of possible recovery at which the settlement is fair, adequate and reasonable. The position of Defendants on this point is straightforward. Barnett believes that the lawsuit had virtually no settlement value other than nuisance and attorneys' fees to be incurred by Defendants and elimination of an unproductive expenditure of management time. Defendants' counsel forcefully presented this position, both in their papers and at the January 3, 1992 hearing. Plaintiffs' counsel, as stated previously, also represented that following discovery, the case was not as strong on the merits as originally thought and that the Settlement was the best resolution that they could reasonably expect to obtain. This Court agrees.

9. The fourth factor to be considered by the Court is the complexity, expense and duration of the litigation. The Court having heard the discovery disputes between the parties has knowledge concerning all these factors. Securities litigation, such as the one brought by the Plaintiffs in this case, is time-consuming, expensive and often lasts for years. Barnett's resolve to litigate every contestable issue in this case has been amply demonstrated. Plaintiffs' counsel has been no less adversarial. For example, with respect to one particular discovery dispute that this Court handled, the Plaintiffs filed an objection to the order of the district court which, when affirmed, was followed by a petition for a writ of mandamus to the United States Court of Appeals for the Eleventh Circuit. The Court has no doubt that this case is one of the most complex, expensive and potentially longlasting [sic] cases that is on the docket in the Middle District of

Florida.

10. The fifth factor to be considered by the Court is the substance and amount of opposition to the settlement. Barnett's counsel at the January 3, 1992 hearing stated that over 37,000 Notices had gone to Barnett shareholders who were holding Barnett stock in their own name while an additional 38,000 had been set to Barnett shareholders whose stock was held in street name, for a total of over 75,000 Notices. In addition, as stated previously, a newspaper summary notice was published nationwide. From all these Notices to class members, only five objections had been filed with this Court. The first objection, while raising the possibility of collusion, objects primarily to the payment of Plaintiffs' attorney's fees, which will be dealt with below. The second objection requests that the warrants be made available to individuals who sold Barnett stock for a profit. The third objection, a handwritten

letter, complains that Barnett's officers acted improperly with respect to the loan loss reserves. The fourth objection is that filed by Mr. Wagshal which will be dealt with in the following paragraph. The fifth objection, much like the first, objects to the Plaintiffs' attorney's fees, and also to the value of the warrants. The Court finds that none of the first three objections nor the fifth objection present [sic] any substantial reason to not approve the Settlement. The Court has already found hat there was no collusion or fraud between the parties and will make its own determination with respect to the proper amount of attorney's fees as set forth below. In addition, the Court finds that shareholders who have sold their Barnett stock for a profit can be excluded from recovery in the class in order that more warrants be made available to those shareholders who have sold for a loss or who have not sold their shares

and may suffer a loss. Finally, while the Court has read and considered the handwritten objection, the Court can find no reason to disapprove the Settlement merely because one out of the tens of thousands of Barnett shareholders may personally believe that Barnett's officers acted improperly.

11. Mr. Wagshal has filed a lengthy objection to the Settlement and also appeared and presented testimony at the January 3, 1992 hearing. Mr. Wagshal has also stated in both his written materials and at the January 3, 1992 hearing that he has some degree of expertise as an attorney with respect to class actions, including those involving securities fraud. mr. Wagshal was allowed the opportunity to both make argument and present testimony and evidence in opposition to the Settlement. Mr. Wagshal's failure with respect to the issue of fraud or collusion amongst the parties and their counsel has been detailed above and will not

be dealt with again here. Mr. Wagshal was equally ineffective in presenting any testimony or evidence to suggest that the Settlement was not fair, adequate and reasonable given the factors set forth in this order. Finally, the Court finds that the extension of the class period is appropriate given the nature of the allegations relating to loan loss disclosure and the continuing uncertainty of the economy during the extended period. Defendants do not want to settle this case only to be exposed to another suit concerning additions to its [sic] loan loss reserves made in the latter part of 1990 and early 1991. See Mashburn, 684 F.Supp. at 676 ("A forward extension of the class period is justified given that even after the prior announced cutoff of the class period in March 1987, [the defendant] made additional writeoffs of its bad debts.").

12. The sixth factor for this Court to

consider is the stage of the proceedings at which the settlement was achieved. Settlement in this case was reached only after substantial document discovery had occurred. In addition there was considerable pretrial motion practice which has given the Court an opportunity to become familiar with the merits of the case, the complexity of the case, as well as the advocacy of counsel for both parties. On all accounts, this Court has had sufficient information to evaluate whether the Settlement reached between the parties is fair, adequate and reasonable.

13. In determining the fairness of a proposed settlement, the Court can rely upon the recommendation of experienced counsel, and absent fraud "should be hesitant to substitute its own judgment for that of counsel." Behrens, 118 F.R.D. at 539. The weight accorded to the recommendation of counsel is dependent on a variety of factors: length of involvement in the litigation,

competence, experience in the particular type of ligiation and the amount of discovery completed. Manual for Complex Litigation, Sec. 30.41 (2nd edition 1985). Counsel for Plaintiffs and Defendants who have reached this settlement are the same advocates involved in this action since is commencement. The Court finds that counsel for all parties are competent and have been involved, and are currently involved in this type of litigation, despite Mr. Wagshal's contentions to the contrary. Further, as discussed above in this opinion, a substantial amount of discovery has been completed, and has been vigorously contested by the same counsel which proposed the settlement before this Court today. In sum, the Court will afford the recommendations of counsel in this case substantial weight.

14. The final factor which this Court will consider is the ability of the Defendants to withstand greater liability.

At the January 3, 1992 hearing, Defendants' counsel stated to the Court that its [sic] client, Barnett, was only as strong as its shareholders, and that therefore, settling this cause was appropriate despite Barnett's belief that this lawsuit was completely meritless. There is no doubt that Barnett has the resources to pay a larger judgment than the settlement currently before the Court. However, in the light of the fact that Plaintiff's case is admittedly weak, and that Barnett's stock has gained substantial strength since the commencement of this lawsuit, the court finds that settlement is the most appropriate avenue despite the defendant's ability to withstand greater liability.

15. Based upon this Court' familiarity with this cause and after reviewing the materials in the Court's file, and hearing argument, and applying the above factors, the Court finds that the Settlement was obtained

without fraud or collusion and is fair, adequate and reasonable. In conclusion, the Settlement should be approved.

16. Plaintiffs' counsel, having recovered a common fund for the benefit of the class, are entitled to a reasonable attorneys' fee from the fund as a whole. Boeing Co. v. Gemert, 444 U.S. 472, 478, 100 S.Ct. 745 (1980).

17. The attorneys' fees and reimbursement requested are reasonable and appropriate in light of its relation to the benefit conferred on the class. See Camden I Condominium Associates, Inc. v. Dunkle, 947 F.2d 768 774-75 (11th Cir. 1991); Mashburn v. National Health Care, Inc., 684 F.Supp. at 692-93. An award of attorneys' fees in cash is appropriate where the class receives non-monetary forms of compensation. Moyor v. Automatix, C.A. No. 85-2326-MC (D.Mass 1987); Elscint Ltd. Securities Litigation, MDL No. 675, C.A. No. 85-2662 K (D.Mass. 1990); Polk

v. Good, 507 A.2d 531 (Del.super.Ct. 1986); Geller v. Tabas, 462 A.2d 1078 (Del.Super. Ct. 1983); Santa Fe Southern Pacific Corp., Consolidated No. 9523, Allen, Ch. (Del. Ch. 1989); American Brands, Inc. Shareholders Litigation, Consolidated No. 9616, Berger, V.C. (Del.Ch. 1988); In re: Georgia Gulf Shareholders' Litigation, C.A. No. 11054 (Del.Ch. 1990). See generally Plaintiffs' Notice of Filing Supplemental Authorities in Support of Fee Petition.

Accordingly, it is

ORDERED AND ADJUDGED

1. That the settlement of this class action is fair, adequate and reasonable and is approved.

2. That Plaintiff's amended complaint is hereby dismissed with prejudice.

3. That Plaintiff's petition for attorneys' fees and expenses is hereby approved.

DONE AND ORDERED in Chambers in

Jacksonville, Florida, this 30th day of January, 1992.

/s/Harvey E. Schlesinger
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record and

Jerome Wagshal

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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MAURICE BRAMON, et al.,

Plaintiffs,

v. Case No. 90-216-CIV-J-16

BARNETT BANKS, INC., et al.,

Defendants.

ORDER

This cause is before the Court on the following motions: (1) Objecting Class Member Jerome S Wagshal's Motion for Amended and Additional Findings of Fact and Amendment of the Judgment Pursuant to Fed.R.Civ.P. 52(b) filed on February 19, 1992 (Document #217); (2) Objecting Class Member Jerome S. Wagshal's Objections to the Order of the

Magistrate Judge Dated February 7, 1992, filed on February 24, 1992 (Document #224); and (3) Objecting Class Member Wagshal's Motion to Strike Portions of Plaintiffs' Attorney's Response to the Objecting Class Member's Motion for Supplemental Findings, for Adoption of these Supplemental ?Findings and for Disapproval of the Proposed Settlement filed February 25, 1992 (Document #227). After due consideration of the motions, the memoranda submitted by various parties, any accompanying affidavits, and the applicable law, the Court finds that all of these motions should be denied.

1. With respect to the Magistrate Judge's Order dated February 7, 1992, the Court finds that it should be affirmed. The Court finds that Mr. Wagshal's motions filed on January 31, 1992, (Documents #207 and 208) were properly denied as moot. The Court

approved the settlement and signed the Order on January 30, 1992. The Clerk then filed the Order at 10:01 a.m. on January 31, 1992. Mr. Wagshal's motions were filed by the Clerk at 10:34 a.m., on January 31, 1992, subsequent to both the execution and filing of the Order. Therefore, the February 7, 1992, Order is not clearly erroneous or contrary to law. Fed.R.Civ.P. 72(A). The objections are overruled and the Magistrate Judge's Order is AFFIRMED.

2. The Objecting Class Member Jerome S. Wagshal's Motion for Amended and Additional Findings of Fact and Amendment of the Judgment Pursuant to Fed.R.Civ.P. 52(b) filed on February 19, 1992 (Document #217) is hereby DENIED.

3. The Objecting Class Member Wagshal's Motion to Strike Portions of Plaintiffs' Attorney's Response to the Objecting Class

Member's Motion for Supplemental Findings, for Adoption of these Supplemental ?Findings and for Disapproval of the Proposed Settlement filed February 25, 1992 (Document #227) is hereby DENIED.

This case has been settled, and the settlement has been approved by this Court.

Accordingly, the Clerk is directed to close this case.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 2nd day of March, 1992.

/S/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

APPENDIX E

Federal Rules of Civil Procedure

Rule 1

These rules...shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 8

(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(f) All pleadings shall be so construed as to do substantial justice.

Rule 23

(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24

(a) Upon timely application anyone shall be

permitted to intervene in an action...when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Supreme Court, U.S.
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No. 94-1506

In The

Supreme Court of the United States

October Term, 1994

JEROME S. WAGSHAL,

Petitioner,

v.

BARNETT BANKS, INC., CHARLES E. RICE, ALBERT D. ERNEST, STEPHEN A. HANSEL, ALLEN L. LASTINGER, JR., CHARLES W. NEWMAN and EARL B. HADLOW,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a class member who is an attorney and who knowingly decides not to become a party in a class action have standing to appeal a trial court's order approving a class settlement?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. *Petitioner (Objector and appellant below)*
Jerome S. Wagshal

B. *Respondents (Defendants and appellees below)*
Barnett Banks, Inc.
Albert D. Ernest, Jr.
Earl B. Hadlow
Stephen A. Hansel
Allen L. Lastinger, Jr.
Charles W. Newman
Charles E. Rice

C. *Other Parties (Plaintiffs and appellees below)*
Maurice Bramon
John Paul Decker
John Heller
Harvey Karp, Trustees of Circle Packaging Corp. Pension Plan
Richard Rosenberg
Theodore Rosenberg
Donald F. Sullivan
Florence W. Sullivan
Howard Weiner

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STATEMENT OF THE CASE

Petitioner Jerome S. Wagshal's statement of the case misrepresents and omits relevant facts regarding his participation before the trial court with respect to the approval of the settlement of the class action. The underlying class action, although frivolous from defendants' perspective, had been an expensive, hard fought case that was only settled after extensive discovery and negotiations about the terms of the settlement. In settlement, the defendants agreed to pay $300,000, provide warrants in Barnett Banks, Inc. common stock which were valued at $1,250,000 and pay the costs of administering the settlement fund in exchange for dismissal with prejudice and a general release.

Wagshal, an attorney, knowingly decided not to become a party to these proceedings at any time. Even in Mr. Wagshal's initial brief before the United States Court of Appeals for the Eleventh Circuit, he continued to press the point that he was not a party to the proceedings below.

On January 3, 1992, Judge Schlesinger of the United States District Court for the Middle District of Florida conducted a three-hour evidentiary hearing on the proposed class settlement. (R13-206-9, R16-235-2) Counsel for both Bramon and Barnett then presented argument as to the reasons the settlement should be approved. (R16-235-1 to 40)

Wagshal made an appearance as counsel for himself and told Judge Schlesinger that: "I have not read the court file." (R16-235-44) Wagshal then conceded that he was "not denying that this is a hard-fought litigation."

(R16-235-44) Nevertheless, Wagshal argued in opposition to approval as follows: "As your Honor knows, and is familiar in the law, it's a lot easier to steal a dollar from ten million people than it is to steal $10 million from one person." (R16-235-65) Wagshal went on to conclude: "But this banking system of this country, as your Honor knows, is in a shambles. As bad and as low esteem as lawyers are held by the general public, bankers have come to be held in even lower esteem." (R16-235-67) Attorney Wagshal also presented live testimony concerning his paralegal's review of the proofs of claim sent in by class members. (R16-235-101) On cross-examination by Barnett, the paralegal testified that she had not read any written comments that stated that the settlement was a bad one or should not be approved. (R16-235-111) She also testified she lived with Wagshal. (R16-235-111)

Perhaps even more important was the lack of any evidence in support of Wagshal's claim that the warrants were without value. Wagshal presented absolutely no testimony, expert or otherwise, to contradict the warrant valuations by Howard Lawson and Dillon Read, two investment banking firms that had been retained by plaintiffs and defendants, respectively. Wagshal himself described his ownership of Barnett stock as a "negligible personal stake" and as a "small investment [which] allegedly shows a tiny profit at current market rates." (R12-183-11) Nevertheless, Wagshal argued to the district court that both his "small investment" and "tiny profit" in Barnett were irrelevant because "he has concluded that the settlement should be opposed as a matter of principle – not principal." (R12-183-12) In his very *next* sentence,

Wagshal informed Judge Schlesinger that if he "is instrumental in assisting the plaintiff class, a long line of controlling Supreme Court decisions establish his right to an appropriate award." (R12-183-12) Judge Schlesinger approved the settlement and dismissed with prejudice the Amended Complaint in a seventeen-page Settlement Order entered on January 31, 1992. (R13-206-1)

Wagshal, an unnamed class member, made absolutely no attempt to move to intervene in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure. Wagshal, an attorney who claims experience in class actions, has asserted on a number of occasions that he was not a party to the proceedings below. Wagshal has written that "the class member is *not* a party to the case." (R12-183-3) (emphasis in the original) Wagshal told Judge Schlesinger at the settlement hearing: "I'm not [a] party." (R13-235-98)

In footnote 31 on page 40 of his initial appellate brief, Wagshal reiterated that he was not a party or an attorney to a party in this litigation. Footnote 31 provided in full: "Rule 11 applies to parties and their attorneys, and the O.Cl.Member pointed out that he was neither in this case, but rather had been invited by the Notice to reply with a statement of his position. (183 at 2 *et seq.*)"

Wagshal did not attempt to exercise any of the available procedures by which his interests in the litigation could be protected on appeal. He never moved to intervene. He never opted out of the settlement to pursue his own claim. His only motivation for pursuing this case is to seek an "appropriate award" for "assisting" the class.

SUMMARY OF ARGUMENT

Respondents, Barnett Banks, Inc., Charles E. Rice, Allen L. Lastinger, Jr., Albert D. Ernest, Jr., Earl B. Hadlow, Charles W. Newman, and Stephen A. Hansel (collectively referred to as "Barnett Banks"), submit that there is no clear conflict among the circuits on class members' right to appeal. In addition, the fact pattern present in the instant matter makes this case an inappropriate one for this Court to grant Wagshal's petition for writ of certiorari. Wagshal is an experienced class action attorney who made a knowing decision not to move to intervene as a party at the trial level. Wagshal should not now be allowed to attempt to claim all the benefits of party status.

The interest at issue in an appeal of a class settlement is that of the class as a whole. Each individual member in a Rule 23(b)(3) class may opt out and protect his or her individual interest if they object to the terms of a settlement. The appropriate standing requirement for an appeal should be, at a minimum, party status.

Wagshal espouses a position where any class member can operate on the periphery of a class action, consciously choosing not to intervene or opt out, and then appeal a settlement. As a result, appeals will be brought by people such as Wagshal who lack a sufficient interest in an outcome *to the class as a whole* but do not opt out.

In order to avoid the Wagshal situation of utilizing an appeal to try to obtain a personal award of fees, the trial court should also consider the real interest of the party seeking to intervene. This consideration by the trial court

may be similar to the representation determination made in order to certify a class on behalf of a particular party.

ARGUMENT

Barnett Banks believes that there is no clear conflict among the various United States Court of Appeals regarding a class member's right to bring an appeal of a trial court's order approving a class settlement. In fact, the Court has twice denied certiorari on this issue. *See Croyden Assocs. v. Alleco, Inc.*, 113 S.Ct. 1251 (1993); *Shores v. Sklar*, 493 U.S. 1945 (1990).

Moreover, Wagshal completely omitted from his petition the fact that he was an attorney who made a knowing decision not to participate as a party at the trial level and so informed both the trial court and the appellate court. Consequently, this is not a good case for review.

I. THERE IS NO CLEAR CONFLICT AMONG THE CIRCUITS.

In *Marino v. Ortiz*, 484 U.S. 301 (1988), this Court reiterated the longstanding rule that " . . . only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment. . . . " *Id.* at 304. In response to the Circuit Court's suggestion that there may be exceptions to this general rule, the Court stated "We think the better practice is for such a nonparty to seek intervention for purposes of appeal. . . . " *Id.* Since *Marino*, every circuit court of appeals that has considered the issue of whether a class member may appeal from an appealable

district court order has held that the class member has no standing without having previously moved to intervene.

The United States Court of Appeals for the Eleventh Circuit in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), gave three reasons for holding that individual, non-named class members do not have standing to appeal a final judgment binding on the class members. The Eleventh Circuit stated as follows:

> *First*, such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure. *Second*, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. *Third*, class actions could become unmanageable and non-productive if each member could individually decide to appeal.

Id. at 628.

The United States Court of Appeals for the Seventh Circuit, contrary to Wagshal's assertion, followed the *Guthrie* reasoning in *Matter of VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992). In *VMS*, which Wagshal cites as the most recent case from the Seventh Circuit on this issue, the Court dismissed a class member's appeal for lack of standing to appeal. In so holding, the Court determined that a class member who served on the Oversight Committee created to oversee the proceedings that were the subject of the appeal was not a party and its participation did not confer upon it a right of appeal. *Id.* at 366-67. In fact, the *VMS* court found the *Guthrie* analysis persuasive. *Id.* at 368. In the instant

case, Wagshal, like the Oversight Committee, is a non-party participating in the proceeding. Therefore, contrary to Wagshal's assertion, this case is consistent with the Eleventh Circuit's decision in *Guthrie*.

Finally, the Third and Ninth Circuit cases cited by Wagshal as conflicting with the Eleventh Circuit either pre-date *Marino* or are factually inapplicable. In the Third Circuit, Wagshal cites to *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993), which concerns derivative claims brought on behalf of a corporation and not class claims brought on behalf of the members of a class. Consequently, that case is distinguishable.

Finally, Wagshal cites *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (5th Cir. 1977), in support of his contention that the Ninth Circuit grants standing to class members who fail to intervene at the district court level. However, *Marshall* is easily distinguishable from the instant case.

In *Marshall*, the class member seeking to challenge the class action settlement agreement was a *named class representative* who brought a cross claim against another named class representative. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (5th Cir. 1977). In addition, the class representative in *Marshall* was not challenging the fairness of the class action settlement agreement like Wagshal. *Id.* Instead, the class representative objected to the district court maintaining the class action due to alleged conflicts between the class members. *Id.* Such conflicts allegedly made the class action inappropriate. *Id.*

Consequently, there is no clear conflict among the circuits on the issue of class members' standing to appeal.

In apparent agreement, on two recent occasions, this Court has denied certiorari on this issue. *See Croyden Assocs. v. Alleco, Inc.*, 113 S.Ct. 1251 (1993); *Shores v. Sklar*, 493 U.S. 1945 (1990).

II. WAGSHAL INTENTIONALLY CHOSE NOT TO MOVE TO INTERVENE OR OPT OUT.

Even if a conflict among the circuits is assumed, this case is not properly postured for review on this issue. This is not a case where someone lost a right because of a procedural problem. Wagshal intentionally chose not to intervene or opt out. Instead, Wagshal simply seeks a fee for purportedly representing the class even though he was never counsel to the class.

Wagshal's situation provides support for each of the three reasons given by the Eleventh Circuit in *Guthrie* for its holding that only parties can appeal a class settlement. First, Wagshal could not represent the class absent being approved as a representative pursuant to the provisions of Rule 23. Certainly, Wagshal could not be a representative when he had an alternative interest in obtaining a fee recovery for representation. Second, Wagshal had available the opportunity to protect his individual interest through the simple mechanism of opting out. Instead, Wagshal chose to object to the settlement, not opt out or submit a claim. (The settlement required class members to submit a claim in order to obtain the warrants. At the appellate level, Wagshal openly admitted that he did not submit a claim and did not opt out.) Finally, the history of this litigation by Wagshal demonstrates the increased cost that results from allowing any class member to file an

appeal regardless of the interest of the class as a whole. The record concerning Wagshal's activities evidences the expense and time associated with his attempt to obtain a fee award by holding hostage the finalization of the settlement. This type of conduct cannot be endorsed.

The evidence that was presented before the trial court made it absolutely clear that the only interest Wagshal had in the approval of the settlement was a personal one to obtain an award of fees. Wagshal attacked everyone involved in the class action. Wagshal's appellate brief specifically requested that the trial court judge, Judge Schlesinger, be removed from the case. He also made ethical accusations against counsel for Barnett Banks, Inc.. Furthermore, he made similar but less direct accusations against counsel for the class plaintiffs. He attacked the investment banking firms who had given their views on valuation of the warrants without a shred of evidence to contradict their conclusions. Finally, despite being an attorney, he claimed to have directly contacted an officer of a subsidiary of Barnett Banks, Inc. with respect to the settlement. Even worse, he brought to the attention of the appellate court this improper, ex parte, and outside the record activity on his part. Similarly, he has brought this conduct to the attention of this Court in his petition. *Petitioner's Brief* at p. 4, note 2.

Wagshal is no stranger to securities or class action litigation. A Westlaw or Lexis search reveals two prominent, relatively recent cases. The first one involves a 1987 decision of the United States Court of Appeals for the District of Columbia Circuit in *National Association of Mental Health, Inc. v. Califano*, 717 F.2d 1451 (D.C. Cir. 1983). Wagshal filed a class action suit for fees against

purported former non-named class plaintiffs whom he claimed to have previously represented. The appellate court affirmed the dismissal of the complaint.

Most recently, in *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), Wagshal was unsuccessful in the United States Court of Appeals for the District of Columbia Circuit in his appeal of the dismissal of his lawsuit against a mediator and each member of the mediator's law firm based upon the court-ordered mediation's failure to properly handle a suit that he had personally brought. The appellate court again affirmed the dismissal.

While it is conjecture to consider exactly why Wagshal decided not to attempt to become a party in the proceedings below, Wagshal's past, as well as his desire to obtain a fee award, are probably the answer. Wagshal had no concern for the class as a whole. All that he cared about was his own personal financial interest in obtaining a fee award. While inappropriate to detail in this brief, had an evidentiary hearing been held concerning Wagshal's ability to intervene as a party, certain outside the record communications with counsel for both the class plaintiffs, as well as Barnett Banks, Inc., would have been disclosed. In short, Wagshal knowingly decided not to intervene because he knew that the chances of a successful motion were extremely unlikely.

All of the individual circumstances involving Wagshal point to the importance of requiring intervention as a prerequisite to appealing a class settlement. Otherwise, appeals will be brought with respect to virtually any class settlement regardless of the interests of the class as a whole by class members with ulterior motives. When

intervention is required, the trial court can consider the purported intervenors' reasons for requesting intervention at the time intervention is requested.

All of the above issues could have been fully explored by the trial court had Wagshal chosen to try to intervene as a party. Everyone concerned, namely Barnett Banks, Inc., the class representatives and Wagshal would have had a full opportunity to present their views on whether it would be appropriate for Wagshal to become a party in light of his purported interest in this matter. That decisionmaking process never took place because Wagshal knowingly chose not to seek to intervene again, perhaps to avoid the very inquiry that the intervention process affords to the then-existing parties.

CONCLUSION

This Court should deny Wagshal's petition for writ of certiorari.

Respectfully submitted,

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In The

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October Term, 1994

JEROME S. WAGSHAL,

Petitioner, Pro Se,

vs.

MAURICE BRAMON, *et al.*,

-and-

BARNETT BANKS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MAURICE BRAMON, *et al.*

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Respondents, Maurice Bramon, John Heller, Harvey Karp, Howard Weiner, Richard Rosenberg and Theodore Rosenberg ("Class Plaintiffs"), submit this brief in opposition to the Petition for Certiorari.

STATEMENT OF THE CASE

The Petitioner in this action seeks certiorari review of a per curiam dismissal of the Petitioner's appeal for lack of standing. Petitioner, proceeding *pro se*, is an objecting Class Member to a class action settlement. Petitioner is also an attorney admitted to practice before this and other courts throughout the United States. Notwithstanding clear authority in the Eleventh Circuit requiring intervention under Rule 24, Fed. R. Civ. P. ("Rule 24") in order to perfect rights to appeal, Petitioner failed to do so in the Circuit Court and now challenges the dismissal of his appeal by attacking the precedent he failed to follow.

This action arose as a consolidation of several shareholder actions. The Class Plaintiffs' claims were brought under Section 10(b) of the Securities Exchange Act of 1934 on behalf of open market purchasers of the common stock of Barnett Banks, Inc. ("Barnett") between March 1989 and March 1990. The litigation was extremely hard fought. On October 28, 1991, the case was settled for $1,300,000 in warrants and $300,000 in cash. Plaintiff's counsel (who had expended over $55,000 in costs and incurred approximately $750,000 in attorney's time), petitioned for an award of counsel fees and costs of $300,000 in cash and $50,000 in warrants. The settlement and the fee were approved over the objections of Jerome Wagshal, the Petitioner in this Court, who claimed to be the purchaser of 26 shares of Barnett's common stock.

After extensive document discovery in the District Court, Plaintiffs' counsel determined that the case should be settled.

Discovery raised concerns as to the ability of Plaintiffs to establish liability, and the intervening increase in Barnett's publicly traded stock price raised serious concerns about the continued viability of the case. While Barnett's stock price had fallen from $30.62 to $29.38 after the announcement of reserve increases on March 16, 1990, by August 1991 the stock had recovered to the point where it was trading at over $35 per share. The parties focused on a settlement comprised of warrants in order to give Class Members the opportunity to benefit from Barnett's increasing stock price. Having determined that the litigation should be resolved by the issuance of securities which enabled Class Members to potentially share in Barnett's successful recovery from the Florida real estate recession, class counsel retained an investment banking firm to assist in obtaining the best warrants available for the Class. The Defendants retained their own investment bankers to advise them.

The parties then proceeded to negotiate over a period of several months on the issues of the duration and the exercise price of the warrants. It was ultimately agreed that the warrants would have a ten-month duration, and the exercise price would be the lower of $45.50 or 1.4 times the closing price of Barnett common stock on March 31, 1992. The actual exercise price ultimately was $44.80 under this formula. (This price was ultimately exceeded, but not until after the warrants had expired.) Both Plaintiffs' and Defendants' investment banking firms rendered opinions that the warrants were worth $1 each at the time they were issued.

Petitioner objected at the settlement hearing, filed papers in opposition to this settlement, but never bothered to move to intervene under Rule 24.[1] While Petitioner argued various

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1. Having failed to intervene and properly become a party to the litigation, Petitioner suggests he was somehow treated as if he were a party. (Cont'd)

jurisdictional points with Appellee Barnett after filing his Notice of Appeal, Appellee/Class Plaintiffs did not participate in the various motions filed by Barnett. Upon the filing of their answer brief in the Circuit Court, the Class Plaintiffs pointed out that the Petitioner lacked standing to prosecute this appeal by reason of his failure to formally intervene under Rule 24.[2] The Eleventh Circuit agreed and summarily dismissed the appeal.

REASONS FOR DENYING THE WRIT

THERE ARE NO "SPECIAL AND IMPORTANT" REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI.

There are no "special and important" reasons for the granting of a writ of certiorari in this case as required by Rule 10.1 of the Rules of this Court. The principal argument advanced by Petitioner for the granting of a writ of certiorari is that a conflict exists among the Circuits as to the requirement to intervene under Rule 24 as a party to the litigation in order to have standing to appeal a final order in a class action brought under Rule 23(b)(3) Fed. R. Civ. P. There is hardly a conflict among the Circuits on this issue. Indeed, every Circuit that has addressed this issue since 1987 has adopted the same holding as *Guthrie v. Evans*, 815

(Cont'd)

Neither Class Plaintiffs nor Barnett nor their respective counsel considered or treated Petitioner as a party, and there is no basis for the suggestion that Petitioner's standing was "conceded *sub silentio*." Petition for Writ of Certiorari (hereinafter "Petition for Cert."), p. 7.

2. Since a single judge on a motion calender is without authority to dismiss an appeal pursuant to Rule 27(c) of the Federal Rules of Appellate Procedure, the Appellee's brief was the appropriate time to raise the fact that the Appellant had failed to follow the clearly articulated holding of prior Eleventh Circuit case law by not intervening pursuant to Rule 24.

F.2d 626 (11th Cir. 1987), in the context of a Rule 23 class action. There is no court that has specifically addressed the question presented here and decided the issue in a manner contrary to *Guthrie*. The decisions on which Petitioner relies to create some "conflict" on this procedural question are cases in which the issue was simply never addressed; discussed only in *dicta;* or decided in the context not of a class action, but of a shareholder derivative action brought under Rule 23.1, where the shareholder has no claim independent of the corporation.

Petitioner's mischaracterization of the factual background of the settlement also does not provide grounds for certiorari review. This case was settled after extensive, hard fought litigation, when the parties were in a position to evaluate the merits of the case. At the eleventh hour, Petitioner, the holder of 26 shares of Barnett stock, appeared and objected to the settlement for reasons known only by Petitioner. Petitioner's rhetoric does not change that fact, or in any way suggest a basis for further review.

ARGUMENT

I.

THERE IS NO MAJOR CONFLICT AMONG THE CIRCUITS, AND THIS COURT HAS TWICE REJECTED CERTIORARI PETITIONS ON CASES RAISING THE SAME ISSUES ADVANCED BY PETITIONER.

This Court has twice denied certiorari in cases which presented the same standing issue on which Petitioner seeks certiorari review. *See Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1251 (1993); *Shores v. Sklar,* 844 F.2d 1485 (11th Cir. 1988), *cert. denied,* 493 U.S.

1045, 110 S. Ct. 843 (1990). This suggests that this Court, both in 1990 and 1993, determined that the issues advanced by Petitioner are neither "special" nor "important" within the meaning of Supreme Court Rule 10, and further that the conflict suggested by Petitioner is neither as real nor as significant as Petitioner suggests.

A. Subsequent to *Marino v. Ortiz*, the Circuit Courts Are Unanimous in the View that Intervention Under Rule 24 Is Required to Obtain Standing to Appeal a Final Order Approving a Class Action Settlement.

In *Marino v. Ortiz*, 484 U.S. 300, 108 S. Ct. 586 (1988), this Court was faced with an appeal from a final hearing approving a consent decree in settlement of an action brought under Title 7 of the Civil Rights Act of 1964. The action was brought on behalf of Black and Hispanic police officers. The petitioners, while not absent class members, were officers who would be affected by the final judgment in the case and, thus, had a legally cognizable interest at stake. The petitioners had failed to intervene, but had lodged their objections before the district judge. This Court held that "since petitioners were not parties to the lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal the consent decree." 484 U.S. at 304, 108 S. Ct. at 587. In so doing, this Court adhered to the rule that only parties to a lawsuit, or ". . . those that properly become parties . . ." may appeal a final judgment. *Id.* This Court in *Marino* went on to note that while the Court of Appeals had suggested there may be exceptions to this rule, ". . . we think the better practice is for such a non-party to seek intervention." 484 U.S. at 305, 108 S. Ct. at 588.

In the year prior to the Court's holding in *Marino*, the Eleventh Circuit, in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), held that in order to preserve the right to appeal from a

class action settlement, a class member must formally intervene under Rule 24. Subsequent to this Court's holding in *Marino,* every Circuit Court that has addressed this issue squarely in the context of a Rule 23(c) settlement has held that, absent intervention, a non-party class member has no standing to appeal. *See Schultz v. Champion International Corp.,* 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.,* 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.,* 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite,* 858 F.2d 1071 (5th Cir. 1988). In addition, the Seventh Circuit in *In the Matter of VMS Partners Litigation,* 976 F.2d 362, 368 (7th Cir. 1992), found "*Guthrie's* analysis persuasive where an unnamed class member . . . is appealing a post-settlement order implementing the settlement agreement." *Id.*

Post *Guthrie* and *Marino,* there has been virtually no contrary view on this issue in the context of a class action settlement. In order to appeal a final judgment approving a class action settlement, one must take the relatively simple step of intervening under Rule 24 as a party plaintiff.

The rationale of *Guthrie* and subsequent cases is clear. Rule 23 establishes a procedure whereby a class representative acts as a fiduciary on behalf of the class. An individual who has some interest in the outcome of litigation, but does not assume the fiduciary responsibilities of the class representative, cannot act on behalf of the class. The notion of non-parties bringing appeals, often when they take interest in the litigation only at its conclusion, is contrary to the framework for representative litigation set forth in Rule 23. Just as merely having an interest in the outcome of litigation was held by this Court in *Marino* to be insufficient to confer standing, "merely the interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them." *Shults v. Champion International Corp.,* 35 F.3d at 1060.

There can be no claim that, absent standing to appeal, substantive rights will be jeopardized. Class members have adequate procedures under the Federal Rules of Civil Procedure to protect their substantive rights. As *Guthrie* and subsequent cases point out, class members may intervene under Rule 24 by filing a motion for intervention in the district court. The denial of such a motion is appealable. A second alternative is that a class member, if dissatisfied with the representation in the class action, may pursue a collateral proceeding. A third option is that a class member may simply opt out of the class under Rule 23(c)(2) and thereby not be bound by any final adjudication. *See Guthrie,* 815 F.2d at 628. There are ample means of protecting the substantive rights of absent class members.

If unnamed class members who have not intervened as parties could initiate appellate proceedings without formally becoming parties, class actions would become unmanageable. As *Guthrie* noted, "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class. . . ." *Guthrie,* 815 F.2d at 629. When procedural protections afforded class members under Rules 23 and 24 are balanced against the specter of unwieldy litigation and the loss of manageability in class litigation, there is no question that the balance tips in favor of precluding appeals by those who have failed to take the rather simple step of intervention under Rule 24. As the Court in *Gottlieb v. Wiles* noted:

> If individual appeals without formal intervention were permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.

As this Court squarely held in *Marino,* the right to bring appellate review of an adverse judgment is limited to a party. The better practice is to adhere to that limitation, particularly in light of the procedures whereby one can relatively easily become a party through intervention under Rule 24 and, if necessary, appeal the denial of the requested intervention.

B. Petitioner's Claimed Conflict Among the Circuits Is Illusory.

Petitioner suggests "an almost evenly balanced conflict among the circuits" exists on the question of whether intervention is required (Petition for Cert., p. 11). This "almost evenly balanced" conflict apparently rests on the theory that three of the eight Circuits that have addressed this question have found that intervention is not required. This dissenting view is held supposedly by the Third, Seventh and Ninth Circuits. A careful reading of the citations advanced by Petitioner, however, shows that the purported conflict is neither clear, nor evenly balanced.

The only authority Petitioner cites for the notion that the Ninth Circuit adheres to his view is *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977). That case, decided a decade before *Guthrie* and *Marino,* did not squarely address the question of whether intervention under Rule 24 is required to obtain standing to appeal a class action settlement. *Marshall* arose out of a settlement of a class action involving a pyramid scheme. Numerous class actions with differing and somewhat conflicting definitions of the class were consolidated into one action. After the case was settled, an appeal was brought by an entity sued as a defendant in one case, but also part of a defined plaintiff class in another of the pending actions. While it was appellant's status as a class member that ultimately served as a basis for standing to appeal, the issue of whether formal intervention under Rule 24 was required was never raised by the parties or addressed by the

Court. That may have been due to the fact that appellant was technically a "party" by reason of having been named as a defendant in one of the consolidated actions. The Court's opinion, however, is devoid of any analysis of the question of whether intervention as a party under Rule 24 was required.

The notion that the Seventh Circuit law conflicts with the prevailing view articulated in *Guthrie* is also highly questionable. Petitioner cites a 1970 opinion of the Seventh Circuit, *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), in support of the view that the Seventh Circuit does not require formal intervention to obtain standing to appeal. A review of that opinion, however, and subsequent opinions that have considered it, suggest Petitioner's view is misplaced. *Asgrow* arose out of a consent judgment as to the validity of a patent and an infringement of that patent, and an anti-trust action. The anti-trust action was maintained as a class action under Rule 23(b)(3), from which there is a right to opt out. The infringement action was maintained as a class action under Rule 23(b)(1) and (2), from which there is no right to opt out. With respect to the anti-trust action, at footnote 2 the Court specifically stated:

> We need not consider the factual questions concerning the degree of participation by appellants in the settlement hearing and negotiations *since the failure of appellants to formally intervene, after receipt of notice under Fed. R. Civ. P. 23(e) before final judgment forecloses their right to appeal.*

Asgrow, 425 F.2d at 1060, n.2 (emphasis added). The confusion in the reading of *Asgrow* arises from the further statement by the court with respect to the non-opt out class claims under Rule 23(b)(1) and (2) that one who intervenes, or "even appears in response to a notice," may maintain an appeal.

In *Gottlieb v. Wiles*, 11 F.3d at 1011, the Tenth Circuit squarely pointed out that *Asgrow* did not support the notion that formal intervention was not required. After pointing to the above-quoted footnote, the court in *Gottlieb* stated:

> Thus, in the only portion of the *Asgrow* decision directly parallel to the situation in this case, the Seventh Circuit held that formal intervention was a prerequisite to the right of appeal.

Id. As the *Gottlieb* court noted, *Asgrow*, properly read, stands for the same proposition as *Guthrie* in the context of a Rule 23(b)(3) (opt-out) class: "formal intervention was a prerequisite to the right to appeal." *Gottlieb*, 11 F.3d at 1011.

While the notion that *Asgrow* does not require formal intervention in order to appeal from the settlement of an opt-out class under Rule 23(b)(3) is not supported by the case, a recent Seventh Circuit decision suggests that that Circuit is likely to follow *Guthrie* if squarely confronted with this issue. In *In the Matter of VMS Limited Partnership*, 976 F.2d 362 (7th Cir. 1992), a Seventh Circuit panel appeared reluctant to depart from what it construed as the Circuit's prior holding in *Asgrow*, but failed to apply *Asgrow* so as to permit an appeal from a class member who had not intervened. After citing *Guthrie* and finding that its reasoning was "persuasive," the court in *VMS* held that an unnamed class member who had failed to intervene could not appeal a post judgment order implementing the settlement agreement. The Seventh Circuit's opinion in *VMS* is significant because it reflects a clear departure from any notion that a class member who fails to formally intervene has standing to bring an appeal.

Finally, Petitioner's assertion that the Third Circuit has

rejected the *Guthrie* approach is also suspect. While Third Circuit case law suggests a Third Circuit panel might well rule contrary to *Guthrie* in the context of a class action, no Third Circuit panel has squarely done so.

In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), several class members moved to intervene following certification of the class in an asbestos case. The court denied both intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). In denying intervention, the court granted the absent class members who had sought to intervene "broad rights of participation in the class action," 5 F.3d at 711. The proposed intervenors then took an immediate appeal. The Third Circuit dismissed the interlocutory appeal on the theory that, under its prior holding in *Ace Heating & Plumbing, Inc. v. Crane*, 453 F.2d 30 (3d Cir. 1971), the class members who had been denied intervention would later have a right to appeal from any settlement in the case. The *Carlough* court, in *dicta*, sought to distinguish the contrary holdings in *Croyden, Guthrie* and *Walker*,[3] so as to suggest that an appeal would be available absent intervention. The *Carlough* case stands for the proposition that the denial of intervention cannot be addressed on an interlocutory appeal. The panel in *Carlough* seemed to accept, without really analyzing, the notion that *Ace Heating* holds that one need not seek to intervene as a party to obtain rights to appeal a class action settlement, and did not address whether such a rule makes sense.

Petitioner also relies on *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993). In that case, the Third Circuit held that an objector to a shareholder derivative action brought pursuant to Rule 23.1 had standing to object to a settlement even though he did not file a motion to intervene in the district court. Petitioner suggests that the distinction between a class action and a

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3. *Gottlieb* and *Shults* had not yet been decided.

derivative action is not a meaningful one in the standing analysis. However, the Third Circuit panel in *Bell Atlantic* clearly recognized that that is not the case. In a footnote, the court noted that, "in derivative suits, unlike shareholder class actions, recoveries belong to the corporation on whose behalf the suit was brought." *Bell Atlantic*, 2 F.3d at 1307, n.4. The plaintiff in a class action has a personal claim that can be prosecuted outside the context of the class case. While the court in *Bell Atlantic* suggested that the parties had not addressed the distinction between these types of cases, it points out that at least one rationale offered in support of the intervention requirement does not apply to derivative cases. Specifically, the court noted that in a Rule 23(b)(3) class action a shareholder has a right to opt out of the class and bring in his own separate action. *Id.* In a derivative action, the named plaintiff acts solely as a representative for the corporate entity and has no individual stake or claim that can be pursued independently. The plaintiff in a class action has an individual economic stake in the outcome, because the recovery on a damage claim is paid to the members of the class. In a derivative case, a shareholder who has no monetary interest in the outcome of the case would have little incentive to intervene in an ongoing lawsuit. Thus, the factors noted in *Guthrie* as to Rule 23's protections of substantive rights have no application in the context of a derivative case.

The *Bell Atlantic* opinion is also significant in its characterization of *Ace Heating & Plumbing*. Unlike *Carlough*, the court in *Bell Atlantic* noted only that "it is suggested" in *Ace Heating & Plumbing* that an objecting class member need not intervene to protect the right to appeal.

In fact, the *Ace Heating* opinion did not address the issue of whether intervention under Rule 24 was required. In *Ace Heating*, the primary focus was whether the appellant had somehow ratified the settlement and waived his right to object by

not seeking exclusion from the class. The court correctly rejected that notion, noting that the failure to seek exclusion would not waive substantive rights. The word "intervention" appears nowhere in the *Ace Heating* opinion, as the issue simply never came up.

In summary, the conflict between the Circuits that Petitioner suggests is hardly as clear as indicated in the Petition for Certiorari. At best, the Third Circuit appears to be leaning in a direction contrary to *Guthrie*. The Seventh Circuit is clearly leaning in the direction of *Guthrie* as evidenced by *VMS*, and a close reading of the *Asgrow* opinion suggests that case is actually consistent with the *Guthrie* analysis. Finally, the *Marshall* case in the Ninth Circuit is hardly a countervailing view, since the issue of intervention was never raised or discussed.

On the other side of this "conflict" is the unanimous adoption of the *Guthrie* rationale by every post-*Marino* decision to address this issue. The Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have all held — after extensive analysis of the issue — that only parties may appeal cases to the Circuit Court, and that an absent class member who wishes to affect the rights of numerous other class members must formally intervene as a true party to the litigation.

CONCLUSION

Petitioner has neither articulated any substantive right that is adversely affected by the current law, nor demonstrated any true split among the Circuits. Petitioner simply failed to follow clear Eleventh Circuit precedent that required him to intervene in order to establish the right to prolong this litigation through appeals. That hardly constitutes a basis for a writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JEROME S. WAGSHAL,

Petitioner, Pro se

v.

Maurice Bramon, *et al.*

and

BARNETT BANKS, INC., *et al.*

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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April 25, 1995

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PETITIONER'S' REPLY BRIEF IN SUPPORT OF
PETITION FOR FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT

Bramon and Barnett,[1] two former, ostensible adversaries, now open allies, oppose the granting of certiorari, thereby seeking to muzzle a challenge to their cozy class settlement which provided benefits only for themselves--the plaintiff class lawyers and the defendants--and not a red cent for the plaintiff class.

I. Bramon And Barnett's Denials Of The Existence of A Conflict In Circuits Cannot Withstand The Plain English Of The Opinions Which Establish That This Conflict In Circuits In Fact Exists

Bramon and Barnett blink reality when they both argue that there is no conflict among the circuits on the issue to which this petition is addressed, namely, the standing of an objecting class member to appeal a district court's approval of a class action settlement

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1. As previously, "Bramon" refers to the plaintiff class representatives and their attorneys, and "Barnett" refers to the defendants. See Petition for Certiorari (hereinafter "Pet.") at 3. The Bramon Opposition will be cited as "Bramon Opp." and the Barnett Opposition as "Barnett Opp."

without having been formally permitted to intervene in the district court pursuant to Rule 24, Fed.R.Civ.P.

The plain English of the cases on this issue establishes beyond reasonable argument that a conflict involving more than half the Federal circuits *does* exist. Even the cases upon which Bramon and Barnett rely recognize the existence of this massive circuit conflict. *See, e.g., Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678 (8th Cir. 1992)("The circuits are divided on this issue, and some have inconsistent holdings.").

Petitioner will not lengthen this reply with detailed refutation of each of Bramon's and Barnett's disingenuous attempts to reconcile irreconcilable decisions. One glaring example will suffice to demonstrate the Respondents' lack of candor regarding the existence of a conflict in circuits.

Both Opposition briefs argue that the Seventh Circuit sides with their position that

formal Rule 24 intervention is required, claiming that *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), held that formal intervention *is* necessary, and that *In the Matter of VMS Partners Litigation*, 976 F.2d 362 (7th Cir. 1992), confirmed this alleged Seventh Circuit position.[2]

The truth is otherwise. In *VMS Partners*, the Seventh Circuit authoritatively interpreted its decision in *Research Corp.* as holding that formal intervention is *not* necessary, stating this point explicitly:

> In *Research Corp.*,...[t]his court...stated that if an unnamed class member...even appears in response to a notice pursuant to Fed.R.Civ.P. 23(e) and objects to the dismissal or compromise, he has a right to appeal from an adverse final judgment. *Id.* at 1060; *accord Armstrong v. Board of School Directors*, 616 F.2d 305 327 (7th Cir. 1980). [976 F.2d at 367]

The panel which decided *VMS Partners* confirmed that, "*Research Corp.* would control in this circuit if [the non-intervening class member] were appealing the approval of the

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[2]. See Bramon Opp. at 10; Barnett Opp. 6.

settlement agreement...." 976 F.2d at 368.[3] However, that panel then applied the opposite rule, as first laid down in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), to somewhat different facts, namely, the appeal of a post-settlement order implementing a previously approved settlement. Concededly, if the *VMS Partners* panel had been writing on a blank slate it probably would have followed *Guthrie*, in holding against standing on any appeal, but it was constrained from doing so by an honest reading of prior Seventh Circuit decisions and the rules governing adherence to prior decisions by other panels in the same circuit. In short, *VMS Partners* confirms the existence not only of a conflict *among* the circuits but also, in the Seventh Circuit at least, a conflict of sorts *within* the circuit itself.

A careful reading of the other decisions discussed by Bramon and Barnett will show that

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[3]. And see the repetition of this holding at 976 F.2d at 368, n. 8: "...*Research Corp.* still controls that issue in this circuit."

their disingenuous explanations of those cases as not creating a conflict of circuits are equally flawed.

The Bramon and Barnett Oppositions also argue that most of the recent decisions follow the *Guthrie* rule. That is so.[4] However, this fact does not diminish the circuit conflict or the need to adopt a uniform Federal rule even if *Guthrie* were correctly decided. However, if *Guthrie* was wrongly decided, as petitioner

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4. But not all. *See, e.g., Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (3rd Cir. 1993). The cert. opponents' attempt to distinguish *Bell Atlantic* on the ground that it was a stockholder derivative action has no basis in law or logic. *Bell Atlantic* considered the standing issue in the precisely same context as courts dealing with Rule 23 class settlements, as evidenced both by its discussion of case law, and the various pronouncements by the Court which apply equally to Rule 23 settlements, including the following: "Plaintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees.... Informational constraints exacerbate collective action and agency problems. The effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process...In seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence..."

maintains, the need is even greater for this Court to establish a revised national rule.

There are two grounds on which petitioner maintains that *Guthrie* was wrongly decided, and that this Court should halt any trend to follow it: first, the practical wisdom of experience underlying the conflicting rules on appellate standing calls for rejection of *Guthrie*. Second, and petitioner maintains, more important, basic constitutional doctrine requires rejection of the *Guthrie* rule.

II. If Practical Reasons Are Determinative, The Rule Permitting Appeal Without Formal Intervention Should Prevail

A. Both Oppositions Ignore The Practical Reasons For Permitting Objectors' Appeals

Both Oppositions have little or nothing to say regarding the fact that the lower courts have articulated fundamentally opposing perceptions about the practical consequences of granting appellate standing *vel non* to non-intervening class settlement objectors.

The circuits which permit appeals by

district court objectors absent formal intervention do so out of concern that appellate review should be freely available because, otherwise, plaintiff class attorneys may more easily get together with defendants in a cozy settlement which benefits both while providing no benefit to the class. "Assuring fair and adequate settlements outweighs [*Guthrie's*] concerns that non-intervening objectors will render the representative litigation 'unwieldy.'"[5] Bramon's opposition simply ignores this policy issue, while Barnett's opposition attempts to dodge it by *ad hominem* attacks on Petitioner's motives in pursuing his objection to the settlement.[6]

This concern about possible neglect of the class by a combination of plaintiffs' class attorneys and defendants recognizes the

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5. *Bell Atlantic Corp. v. Bolger, supra,* 2 F.3d at 1310.

6. Barnett's mean spirited *ad hominem* attacks on Petitioner are distorted and untrue in their essentials. Petitioner will not digress to respond when addressing the ultimate tribunal where principles of law should be of paramount concern.

facts of the real world. The instant case is a classic example of a settlement which provides nothing to the plaintiff settlement class,[7] while enriching the class attorneys and the defendants--and which by Barnett's inferential admission was intended to accomplish precisely that result.[8]

This case is by no means a unique example of the selling out of the interests of a plaintiff class by class attorneys whose overriding priority is obtaining a fee award. This problem repeatedly emerges into public notice, and tends to bring class action litigation, and the administration of justice

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7. The plaintiff settlement class covered purchasers 7 months earlier and 16 months later than the class pleaded in the complaint. Barnett thus purchased immunity from suit far broader than what was charged in the complaint by its settlement with Bramon.

8. Petitioner noted that a Barnett officer acknowledged that the settlement warrants provided for the plaintiff class were "way out of the money" and the settlement was intended to benefit only the lawyers who sued Barnett. Pet.4, n. 2. In reply, Barnett Opp. 9 attempts, with shameless audacity, to turn this fact around by suggesting that there was something improper in Petitioner's obtaining the admission although he had every right to do so since he acting pro se. Barnett thus inferentially admits this statement was made by the Barnett officer.

itself, into disrepute. For example, although no citation is available at this writing, on April 17, 1995, the Third Circuit overturned a major class action settlement involving side-mounted gas tanks on GM pickup trucks as granting inadequate benefit to the class. *See* The Washington Post, April 18, 1995, page D1. *See also*, The Wall Street Journal, Sept. 7, 1994, p. A15, "The Corruption of the Class Action," by John C. Coffee Jr., Professor, Columbia University Law School ("Could the prospect of collecting $70 million have affected [the class attorneys'] willingness to enter a class action settlement that will provide no cash recovery to most of the plaintiff class?").

The countervailing concern expressed in *Guthrie*, that permitting non-intervening objectors to appeal class settlements may make class actions "unwieldy," (815 F.2d at 629) has no basis in experience. As suggested at Pet. 18, Respondents, although predictably

echoing *Guthrie*'s "unwieldy" argument, are unable to point to any pattern of interference with the appellate process in the quarter century of judicial history in those circuits which grant standing to non-intervening objectors, nor indeed any single case wherein "unwieldy" interference occurred.[9]

In short, *Guthrie*'s fear of "unwieldy" appellate procedure is baseless speculation. Why should it be otherwise? Inherently there is unlikely to be a greater volume of dispute on appeal then there are objections at the trial level, and district courts have always managed to handle class settlement objections without succumbing to "unwieldiness."

B. The *Guthrie* Rule Operates to Prevent Appellate Standing By Objectors

Carefully read, Bramon and Barnett use *Guthrie* to construct a jurisprudential shell

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[9]. For example, although Bramon makes the "unwieldy" argument, Opp. at 7, it fails to cite a single example where a class action became "unwieldy" in any circuit permitting appeals by non-intervening objectors. Bramon's Opposition enforces the conclusion that the "unwieldy" argument has gained legitimacy only by repetition, not experience.

game, in which the pea of appellate standing cannot be found under any shell. On the one hand, Bramon argues that all that is necessary to preserve appellate standing is "the relatively simple step of intervening under Rule 24...." Bramon Opp. 6. However, under Barnett's view, Opp. 8, whereas an objector may appear *qua* objector in the district court, the same objector must qualify as a class representative for appellate standing.

Curiously, these conflicting positions can both be traced to the three alternatives for non-intervenors suggested in *Guthrie* and embraced by respondents. Although the better point at which to dissect *Guthrie*'s faulty reasoning would be in a brief on the merits, in summary, *Guthrie*'s three alternatives all have the common thread of creating an unsolvable procedural labyrinth for the objector who wishes to preserve appellate standing. That result is deliberate: It was obviously the *Guthrie* court's purpose to keep

objectors out of appellate fora when it raised the specter that appeal of class action settlements may make class actions "unwieldy."

This Court should overturn this deliberate denial of the appellate process to class settlement objectors.

C. Petitioner Is An Appropriate Party To Bring This Issue Before The Court

Although conceding that Petitioner "is an experienced class action attorney," (Barnett Opp. 4), Barnett argues that certiorari should nevertheless be denied, *inter alia*, because Petitioner intentionally chose not to intervene in the district court. *Id* at 8.

Of course, even if that were true, his choice should scarcely be disqualifying for purposes of this Petition. It would simply have set the stage for challenging *Guthrie*.

However, Barnett's charge that Petitioner deliberately rejected intervention is flat out untrue. It was only prior to his appearance in the district court that Petitioner denied having the status of a party: when Petitioner

first objected in the district court, Barnett responded *in terrorum* by proposing that he be sanctioned under Rule 11, Fed.R.Civ.P., for objecting. In response to that outrageous attempt at intimidation, Petitioner noted, *inter alia*, that he was technically not then a party, and thus not subject to Rule 11.

However, when Petitioner subsequently appeared at the district court hearing, he was admitted *pro haec vice* on motion, without objection from either Bramon or Barnett, and in all the ensuing proceedings Petitioner was treated as a party, and understood himself to be a party. Petitioner has pointed out in detail (Pet. 6-8) all of the ways in which he was treated as a party to the district court proceedings. Neither the Bramon nor Barnett Oppositions dispute the facts that at the district court hearing Petitioner called a witness and presented evidence and argument, that he submitted motions thereafter, at least one of which was granted, and that he even

served interrogatories on both Bramon and Barnett which they both answered without objection--all actions which under the Federal Rules of Civil Procedure only a party may do .

As is true in just about all cases involving the *Guthrie* rule, petitioner as an objector was surprised by the application of that rule to his appeal. And the record strongly suggests that both Bramon and Barnett were equally unaware of the *Guthrie* rule until the last stage of the appeal process. For example, Barnett first sought to have the appeal dismissed on the claim of an untimely Rule 52(b) motion, without ever raising the standing issue.

Thus, this case is typical of the many other cases in which the *Guthrie* rule has surprised plaintiff class settlement objectors. A reading of the cases applying the *Guthrie* rule indicates that in all of them the objectors were similarly caught unawares.

This case, however, presents a better

vehicle for Supreme Court review because of Petitioner's admission *pro haec vice* by the district court, and his reliance on the rule of *Piambino v. Balley*, 757 F.2d 1112, 1121 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); and *Farina v. Mission Investment Trust*, 625 F.2d 1068, 1075 (5th Cir. 1980), discussed at Pet. 20-21, and studiously ignored by both Bramon and Barnett.

III. Denial of Appellate Standing Raises the Same Constitutional Principles As Those Requiring Notice To Class Members Of District Court Actions.

Another important point on which the Respondents' Opposition briefs are silent is the grave constitutional issue raised by *Guthrie*. At Pet. 14-15, Petitioner noted the basic Constitutional principles underlying Rule 23, which require that class members be given notice and an opportunity to object to judicial rulings which may affect them.

Petitioner noted, Pet. 15, that these principles do not evaporate beyond the district court level. For Bramon and Barnett

these principles apparently *do* evaporate on appeal. Neither Opposition even alluded in passing to Constitutional issues.

This Court should not permit principles of Due Process and access to the judicial process to be so casually brushed aside.

CONCLUSION

If the grant of certiorari depends on the existence of a major conflict involving more than half of the Federal circuits, that conflict exists here. If the grant of certiorari depends also on the presence of important policy issues and constitutional issues, such as the need to reverse a denial of access to the judicial system, such reasons also exist here.

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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